Supreme Court, U.S.
FILED
APR 9 1998
CLERK

No. 97-1209

In The

Supreme Court of the United States

October Term, 1997

LOCKHEED AERONAUTICAL SYSTEMS COMPANY,
a Division of Lockheed Corporation,

Petitioner,

v.

STACY C. GRAY, *et al.*,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit

BRIEF IN OPPOSITION

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COUNTER-STATEMENT OF QUESTION PRESENTED FOR REVIEW

Whether a survival action claim for pre-death pain and suffering brought pursuant to the general maritime law may co-exist with a concurrent claim for post-death loss of pecuniary support brought pursuant to the Death on the High Seas Act?

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ARGUMENT

In the case at bar the three respondents brought separate and distinct claims under both the general maritime law and under the Death on the High Seas Act, 46 U.S.C. App. §§ 761-768 ("DOHSA"). The only damages awarded pursuant to the Death on the High Seas Act claim were pecuniary *post-death* type damages provided for by the Death on the High Seas Act for the class of beneficiaries defined by that act.

Likewise, the only damages awarded pursuant to respondents' survival action claims brought pursuant to the general maritime law were for *pre-death* pain and suffering. Those pre-death survival damages inure to the benefit of a separate and distinct class of beneficiaries, the estates of the decedents as defined by the probate law of Florida, as all three estates are being probated in Florida.

The District Court made the distinction between these two separate causes of action clear in its final order which stated:

> "In these consolidated wrongful death and survival actions, Plaintiffs seek damages due to their decedents' deaths in the crash of an S-3 Viking jet aircraft ("S-3") that Defendant, a Delaware corporation, manufactured and sold to the United States Navy in 1975. Plaintiffs assert claims under the Death on the High Seas Act, 46 U.S.C. App. §§ 761-768 ("DOHSA"), and general maritime law."
>
> * * *
>
> "Two types of damages are at issue in these cases: 'survival' damages and 'wrongful death'

> damages. '[A] survival action compensates the decedent's estate for damages incurred by him personally while wrongful death recovery compensates the decedent's dependents and other survivors for the damages they incurred due to the death.' *Law v. Sea Drilling Corp.*, 523 F.2d 793, 795 (5th Cir. 1975)."
>
> * * *
>
> "The issue that remains is whether, after *Higginbotham*, Plaintiffs have viable survival claims under general maritime law."

Gray v. Lockheed Aeronautical Systems Co., 880 F.Supp. 1559, 1561-1569 (N.D.Ga. 1995) (footnotes ommitted).

The District Court, in a well reasoned order, went on to conclude that Plaintiffs did have viable survival claims under the general maritime law which were separate and distinct from Plaintiffs' claims pursuant to DOHSA. The District Court awarded $50,000.00 for pre-death pain and suffering to go to each of the three estates involved.

The Eleventh Circuit then wrote a lengthy and detailed analysis of this issue in affirming the District Court. The Eleventh Circuit held:

> " . . . we believe the district court in this case properly followed our colleagues in the First, Third, Fifth and Eighth Circuits in recognizing a general maritime survival remedy and in permitting this remedy to supplement appellees' recovery under DOHSA."

Gray v. Lockheed Aeronautical Sys. Co., 125 F.3d 1371, 1385 (11th Cir. 1997) (footnote and citations omitted).

The issue presented is whether a separate and distinct cause of action for survival damages under the general maritime law may co-exist with a DOHSA claim.

Respondents believe the fairest, and most reasonable interpretation of the statutes and the cases is that both causes of action may be maintained in a single lawsuit.

This is true because all of the damages with which DOHSA concerns itself are post-death damages suffered by a certain class of beneficiaries *other than the tort victim*. DOHSA is silent as to the damages sustained by the actual tort victim and does not in any way prohibit a separate survival action to be brought by the victim's estate for those damages.

DOHSA limits recoverable damages to "a fair and just compensation for the pecuniary loss sustained by the persons for whose benefit the suit is brought." 46 U.S.C. § 762. The measure of damages has been interpreted to mean primarily lost earnings from the time of decedent's death and following. *Gray v. Lockheed Aeronautical Systems Co.*, 880 F.Supp. 1559 (N.D.Ga. 1995).

On the other hand, the survival damages sought and awarded in this case were exclusively for pre-death pain and suffering. The petitoner does not claim that there was any sort of double recovery in this case. To the contrary, the question petitioner presents is whether a tortfeasor should have to pay anything at all for the injury his tort causes to the tort victim.

If petitioners have their way, in the future, all liability for all *pre-death* harm caused by all tortfeasors subject to

DOHSA will vaporize at the moment of their victim's death.

This is not the first time this Court has been faced with this type of issue.

In the case of *Carlson v. Green*, 446 U.S. 14 (1980), respondent brought suit in the District Court for the Southern District of Indiana on behalf of the estate of her deceased son, Joseph Jones, Jr., alleging that he suffered personal injuries from which he died because the petitioners, federal prison officials, violated his due process, equal protection, and Eighth Amendment rights. The District Court held that the allegations pleaded a violation of the Eighth Amendment's proscription against infliction of cruel and unusual punishment. The District Court recognized that the decedent could have maintained that action had he survived, but then the District Court dismissed the complaint because in its view the damages remedy was limited to that provided by Indiana's survivorship and wrongful-death laws and in the District Court's view the amount of damages available to Jones' estate under Indiana law failed to meet § 1331(a)'s $10,000 jurisdictional amount requirement. The Court of Appeals for the Seventh Circuit agreed that an Eighth Amendment violation was pleaded and that a cause of action was stated, but reversed the holding of the District Court. The Court of Appeals held that § 1331(a) was satisfied because whenever the relevant State survival statute would otherwise abate a Bivens-type action brought against defendants whose conduct results in death, the federal common law controls and allows survival of the action. The Court of Appeals reasoned that the Indiana law, if applied, would "subvert" "the policy

of allowing complete vindication of constitutional rights" by *making it "more advantageous for a tortfeasor to kill rather than to injure." Green v. Carlson*, 581 F.2d 669, 674 (7th Cir. 1978) (emphasis supplied). This Court granted certiorari and affirmed the Seventh Circuit Court of Appeals, citing with approval the quoted language. *Carlson v. Green*, 446 U.S. 14, 18 (1980).

So too, in admiralty, if DOHSA were held to bar all survival claims for pre-death damages, then in many cases it would indeed be "more advantageous for a tortfeasor to kill rather than to injure." This is true because DOHSA, only allows recovery for " . . . the pecuniary loss sustained by persons for whose benefit the suit is brought . . . " Thus, if the personal representative who brings the lawsuit were to be unable to show "pecuniary loss" on the part of any "wife, husband, parent, child, or dependent relative" (as might be the case if the decedent were a retiree or an invalid or anyone for whom the personal representative could not prove an expectancy of income) then the tortfeasor may escape with paying little or no damages at all under DOHSA.

As to damages, DOHSA is silent as to the victim and/or the victim's estate. If petitioner has its way, the victim's estate would have no claim against the tortfeasor, even if the victim lingered for a prolonged period in a hospital and incurred substantial medical expenses and/or great pre-death pain and suffering and/or substantial *pre-death* lost wages. In that event, potentially huge medical bills would have to be paid by the victim's estate, rather than by the tortfeasor! If this court were to hold that because of DOHSA's post-death

remedies to people other than the victim, that all claims for damages suffered by the victim (including hospital bills, pain and suffering and lost wages) were to abate at the moment of death, that would indeed be a major coup for potential tortfeasors and their insurers. It would also be a reversal of what respondents believe to be the majority view of the Circuit Courts of Appeals that have considered this issue. As the Eleventh Circuit said in the case at bar:

> "In light of the absence of clear evidence that Congress intended DOHSA to bar the recovery of damages from a survival action, we believe the district court in this case properly followed our colleagues in the First, Third, Fifth and Eighth Circuits in recognizing a general maritime survival remedy and in permitting this remedy to supplement appellees' recovery under DOHSA."

Gray v. Lockheed Aeronautical Sys. Co., 125 F.3d 1371, 1385 (11th Cir. 1997).

Petitioner's view of the law is not in keeping with DOHSA itself, which is silent as to pre-death causes of action and does not limit them. It is also not in keeping with this Court's pronouncement that it:

> "better becomes the humane and liberal character of proceedings in admiralty to give than to withhold the remedy.".

Moragne v. States Marine Lines, Inc., 398 U.S. 375, 387 (1970) (quoting Chief Justice Chase in The Sea Gull, 1 Chase 145, 21 F. Cas. 909, 910 (No. 12,578) (CC Md 1865)).

Petitioner's view of the law would also not be in keeping with the sound policy, espoused by this Court in *Carlson*, that the law should not make it "more advantageous for a tortfeasor to kill rather than to injure." *Carlson* at 18.

Accordingly, respondents strongly believe that the Eleventh Circuit "got it right." If that be the case, then petitioner's petition for writ of certiorari should be denied and the opinion of the Eleventh Circuit should be left standing.

CONCLUSION

This Court has granted certiorari in the case of *Philomena Dooley v. Korean Airlines, Co., Ltd.*, October Term 1997, USSCt. No. 97-704 (hereinafter, the KAL case). The KAL case raises essentially the same issue presented in this case. In the KAL case petitioners' excellent brief on the merits presents many more arguments why survival actions should be allowed to be brought concurrently with DOHSA actions.

Respondents here believe that this Court will correct the error of the District of Columbia Circuit in KAL, and in so doing establish controlling precedent for all circuits. If that is the case, then petitioner Lockheed's petition for certiorari in this case should be denied. Then the correct result of the Eleventh Circuit would stand and this Court's opinion in KAL would become the controlling precedent of the land.

Dated: April 9, 1998

Respectfully submitted,

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